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No. 80-1199

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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THE AMERICAN TOBACCO COMPANY,
TOBACCO WORKERS' INTERNATIONAL UNION, AND
LOCAL 182 OF TOBACCO WORKERS'
INTERNATIONAL UNION,
*Petitioners,*

v.

JOHN PATTERSON, MARION MOSHOE,
EDMUND PAGE, JAMES RANDOLPH
AND PERCY TAYLOR,
*Respondents.*

---

AMERICAN BRANDS, INC.,
*Petitioner,*

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
*Respondent.*

---

**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

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ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
DAVID H. LARRY
MCGUINESS & WILLIAMS
1015 15th Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
*Attorneys for the Amicus Curiae Equal Employment Advisory Council*

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**BRIEF AMICUS CURIAE FOR THE
EQUAL EMPLOYMENT ADVISORY COU
IN SUPPORT OF THE PETITIONERS**

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The Equal Employment Advisory Coun
with the written consent of all parties,[1]
submits this brief as Amicus Curiae i
the Petitioners.

## INTEREST OF THE AMICUS CU

EEAC is a voluntary nonprofit as
ganized to promote the common interes
ers and the general public in sound gove
cies, procedures and requirements pertai
discriminatory employment practices.
ship comprises a broad segment of t
community in the United States, includ
dividual employers and trade and indu
tions. Its governing body is a Board
composed primarily of experts and spec
field of equal employment opportunity
bined experience gives the Council a uni
understanding of the practical and leg
tions relevant to the proper interpretati
cation of EEO policies and requiremen

Substantially all of EEAC's members
stituents are subject to the provisions
of the Civil Rights Act of 1964, as
U.S.C. §§ 2000e *et seq.*). As such, EEA
have a direct interest in the issue pres
Court's consideration; that is, whether
Appeals for the Fourth Circuit has erre
ing that Congress intended that the im
Title VII liability afforded bona fide
tems by Section 703(h) of Title VII

[1] Their consents have been filed with the
Court.

only to seniority practices institute
effective date.[2]

At issue in this case, as in *Pul*
*Swint*, U.S. Nos. 80-1190 and 80-119
viability of the protection Congress
fide seniority systems in § 703(h).
cuit in *Patterson*[3] and the Fifth Ci
*Standard*[4] have advanced interpret
tion which are at odds with this
*International Brotherhood of Tea*
*States*, 431 U.S. 324 (1977), and
properly restrict the protections
cordingly, because of the potentially
upon seniority systems and the ri
accrued thereunder, this Court's di
cases is of vital concern to the n
employees, and unions.

STATEMENT OF THE

Plaintiffs in this employment di
allege that the operation of a lin

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[2] Because of its interest in issues inv
of Section 703(h) of Title VII, EEAC
Amicus Curiae with this Court in *Pullma*
Nos. 80-1190 and 80-1193; *California Br*
*Bryant*, 444 U.S. 598 (1980); *Internati*
*Teamsters v. United States*, 431 U.S.
*Airlines v. Evans*, 431 U.S. 553 (1977)
*Airlines v. Hardison*, 432 U.S. 63 (1977

[3] *Patterson v. American Tobacco Co.*,
Cir. 1980) (*en banc*).

[4] *Swint v. Pullman Standard*, 624 F.2d

promotional policy instituted in 1
VII.[5]

In the *en banc* opinion before this
court held that Congress intended
§ 703(h) to apply only to those sy
on the effective date of Title VII a
Act applications of such systems.
of progression policy was adopted
date of Title VII, § 703(h) was
application, whether or not the pol
a seniority system. As a result, t
held that the discriminatory effect
properly evaluated by the district
disparate impact test of *Griggs v.*
401 U.S. 424 (1971).

In other words, the Fourth Cir
that it was the intent of Congress
Title VII liability only those senio
istence prior to the Act's effectiv
quire that the legality of pre-Act
tems be evaluated pursuant to
crucially, differing legal standard

SUMMARY OF ARGU

The Fourth Circuit's holding w
peal § 703(h) for all post-Act sen
make the validity of such syst

[5] There is a dispute regarding whethe
sion policy was implemented in 1968
prior to the effective date of Title VII.
634 F.2d 744, 757-766, dissent of Jud
majority's reply, *Id.* at 749 and n.4. Fo
of the majority's holding, however, the
the lines of progression policy was imp

whether or not they perpetu
employment practices. *Grig*
401 U.S. 424 (1971). More
would effectively discourage
from changing seniority syst
result are directly contrary
and the intent of Congress.

As this Court has acknowl
tems and the entitlements cor
thereunder are of vast and i
the economic employment s
*Franks v. Bowman Transport*
747, 766 (1976). In § 703(h
recognized the importance o
well as the process of indepe
ing in which they are negoti
unless intentional discriminat
ation of such systems "shall
ployment practice." It is app
decision in *California Brewer*
444 U.S. 598 (1980), that t
VII liability extended by § 70
protects any neutral, bona
whenever adopted.

Congress recognized that r
ity policies could have a "
more recently hired minorit
determined that the protectio
systems was of overriding im
tion of competing interests, C
"[p]ost-Act discriminatees . .
whole' relief, including retr
*Franks v. Bowman* [424 U

*without attacking the legal*
as applied to them" (emp
*v. United States*, 431 U.S.

The circuit court's readi
the unambiguous language
qualifiedly applies to all
over, the legislative histo
that Congress intended th
sult in setting aside, or m
neutral, bona fide seniorit
the sponsors of the bill we
to respond to objections of
that bona fide seniority sy
It is unthinkable that legi
to protect seniority syste
evidence of a Congression
enactment precisely the ty
bill's opponents vigorously
because Title VII would no
port of legislators who res
upon traditional managem
freedoms (*United Steelwo*
193, 206 (1979)), the onl
post-Act systems were int
protections at pre-Act sys

Moreover, under the F
tion, § 703(h) would no l
tems modified by collecti
agreements or consent de
were intended to soften the
practices. Although volun
practices is the preferred
purposes of Title VII, *Ale*
415 U.S. 36, 44 (1974), t

would penalize and, t
tary attempts to am
systems. Thus, the c
in the face of the stat
this Court's decisions
to the proper adminis
antidiscrimination lav

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THE FOURTH C
SECTION 703(h)
SENIORITY SYST
TO THE STATUTO
TIVE HISTORY AN

A. The Language Of
Applicable To All
This Court Has E
cation Of That Se
Labor Policy

The Court has long
trial circumstances ar
rise to a wide variety
ponents of those syst

> It is the essence
> is a continuous p
> to which it addre
> secured by it rem
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> *
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> There are great v
> iority principle
> bearing on the t
> termination of t
> seniority, and the
> seniority. All th
> tions upon the

of seniority in
of collective ba
*Campbell*, 337

Title VII, of course,
pre-existing nationa
*Transportation Co.*,
The Fourth Circuit
plying only to thos
place as of the effe
is antithetical to th
the intent of Congr

As this Court ha
afforded special tre
*World Airlines, In*
(1977). In unamb
bona fide seniority
provides, in pertine

Notwithstandi
chapter, *it sha*

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[9] The "starting po
course, the language
*v. Mt. Hood Stages, I*
more, the "literal or
should be accepted as
to absurd results" or
statute." *In re Trans*
631, 643 (1978).

As noted recently b
language of § 703(h)
equivocal, intent to
seniority systems *even*
*States of America and*
*mission v. Trucking*
Cir., August 14, 1981)

practice f
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tions or p
bona fide
*such diff*
*tion to di*
added.)

It is well settl
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illegal and th
Nothing in th
immunity exte
the date a se
contrary, the
tection is the
negotiation or

Not only do
bona fide seni
Court's decisi
systems negoti
of the Act. I

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[7] *Franks v. E*
747, 758 (1976)
*States*, 431 U.S.
431 U.S. 553, 55

[8] As the disse
has transformed
"grandfather" c
the dissent and
gress undoubted
if it wishes. 1
§ 703(h) by ad
lished" to modif
ate to read suc
statutory provis

portance of se
evolutionary p
developments a
ued viability.
tems and the e
thereunder are
the economic
S. Slichter, J.
Collective Barg
Seniority princ
scarce benefits
to compute nor
contract of em
added.[8]

In this sam
stressed that "
*all* bona fide
n. 30, emphasis

> there is n
> tended in
> mate dep
> plant wid
> [1977], se
> ways, inclu
> in a partic

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[8] *See* Elkouri &
555 (1973) ("M
subsequent Agree
tive bargaining,"
(1954)). Indeed
portantly that it
purposes for ente
is usually to sec
seniority in case
Elkouri at 555 (

> or in a line of progression. 431 U.S. at 354 n. 41 (emphasis added).

In no sense did this Court suggest that the statute is limited in the manner adopted by the Fourth Circuit; rather, in a very real sense, the Court indicated the ongoing and developing nature of seniority systems that Congress sought to preserve.

Similarly, this Court's opinion in *California Brewers* [10] repeatedly reflects Congressional appreciation of the evolutionary nature of collective bargaining and of the inevitable diversity of seniority systems that have been and *will be* developed by parties to collective bargaining in diverse circumstances:

> Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's long-standing labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment. See generally *United Steelworkers v. Weber*, 443 U.S. 193, 99 S. Ct. 2721, 61 L.Ed.2d 480. It does not behoove a court to second-guess either that process or its products. *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 90 S. Ct. 821, 25 L.Ed.2d 146. Seniority systems, reflecting as they do, not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes. *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S. Ct. 681, 97 L.Ed. 1048; *Aeronautical Lodge v. Campbell*, 337 U.S. 521, 69

[10] *California Brewers Association v. Bryant*, 444 U.S. 598 (1980).

> S. Ct. 1287, 93 L.Ed. 1513. As we made clear in the *Teamsters* case, seniority may be "measured in a number of ways" and the legislative history of § 703(h) does not suggest that it was enacted to prefer any particular variety of seniority system over any other. 431 U.S., at 355, n.41, 97 S. Ct., at 1865. 444 U.S. at 608.[11]

While cautioning that § 703(h) would not immunize rules that "depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system," [12] this Court emphasized in *California Brewers* that "[s]ignificant freedom *must* be afforded employers and unions to create differing seniority systems." [13] This language, written

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[11] Congressional deference to the rights secured by seniority systems has been recognized by the Court in a variety of Title VII contexts. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (requirement of § 701(j) of Title VII that employers and unions reasonably accommodate employees' religious practices, absent undue hardship, does not require abrogation of other employees' collectively-bargained seniority rights); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) (a bona fide seniority system that perpetuates the effects the employer's past discrimination is nonetheless protected by § 703(h) of Title VII); *California Brewers Association v. Bryant*, 444 U.S. 598 (a seniority system's "ancillary rules" do not fall outside the protections of § 703(h) simply because they do not "operate on the basis of some factor involving the passage of time.")

[12] 444 U.S. at 608.

[13] *Id.*, emphasis supplied. As has been stressed repeatedly, Congress did not want the courts to "second guess" the parties to a collective agreement, but insisted instead that seniority rights vested under any bona fide seniority system be respected, even if the system perpetuated the effects of

almost 15 years *after* the effective date of Title VI demonstrates that the Court considers § 703(h) to b applicable, *now and in the future*, to the "differin seniortiy systems" that parties to collective bargain ing can be expected to create.[14]

The predictable consequences of the Fourth Ci cuit's holding are at odds with the intent of Congres to encourage the continued resolution of seniority is sues by the bargaining process. Section 703(h) effec tively would be written out of the statute for partie who negotiate new seniority systems. All new o modified seniority systems would be judged by th *Griggs* standard—a result manifestly at odds wit *Teamsters*. See below, pp. 15-18. Consequently, t avoid losing the protections of § 703(h), employer and unions would have a strong incentive to keep th pre-Act systems intact without making necessary o desirable adjustments. Collective bargaining woul be stultified in a manner contrary to the teachings o the *California Brewers* decision.

The disruptive potential of the decision below i better understood when one considers a few of th

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prior discrimination. *See, California Brewers Ass'n v. Bryan* 444 U.S. at 608; *Teamsters*, 431 U.S. at 350-51. *And se Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) ("Courts are generally less competent than employers t restructure business practices, and unless mandated to do s by Congress they should not attempt it."); *Steelworkers v Weber*, 443 U.S. 193, 205-206 (1979); and *Texas Dept. o Community Affairs v. Burdine*, 101 S. Ct. 1089, 1096 (1981) (Title VII "was not intended to 'diminish traditional manage ment prerogatives.' ").

[14] Inexplicably, the Fourth Circuit failed even to mentio the *California Brewers* decision, even though it was decide almost one year before the Fourth Circuit's decision.

seniority issues that must be resolved by the bar
ing process, each of which can be extremely
portant for the relations between the employer
employees and between the employees themselve
pointed out in Slichter, Healy & Livernash, *Th*
*pact of Collective Bargaining on Management*
(1960), initial contract language dealing with se
ity may give rise to administrative or interpr
problems that must be clarified, modified or cha
over time. Questions which arise include:
whether periods of absence from work count to
total service (*Id.* at 118-19); (2) what me
should be used to determine the priority among
ployees with the same seniority date (*Id.*, at 1
(3) what time credit should be given a probati
employee for satisfying his probationary period
at 123); (4) on what bases may seniority be lost
at 125); (5) whether and to what extent to pr
recall and other rights after long or indefinite pe
of unemployment (*Id.* at 127); (6) how to a
seniority for workforces merged during the cons
tion of two or more plants of the same or sep
companies (*Id.* at 130-31); (7) how to deal
the employment rights of employees who have
worked in the bargaining unit as they relate to
employees (*Id.* at 132); (8) how to determin
rights of an employee who moves from a barga
to nonbargaining unit (*Id.* at 132); (9) how to
serve the seniority rights of supervisory pers
who come back to or initially enter the bargaini
seniority unit (*Id.* at 132-33); or (10) how to
lish the rights of an employee who moves fro
seniority unit to another within the same plan
at 134). The peaceful resolution of such basi
ployment relations questions is the cornerstone

country's labor relations policy. The decisior however, would undercut this policy and c disincentive to the creative ordering of the rights of employees.

In addition, it would be more difficult for to Title VII or other employment discriminat gation to settle cases, because any seniority m tion made as part of the settlement would definite risk that the employer's entire senior tem would lose its statutory protection. See 22, below. The Fourth Circuit's opinion thu undermine one of the most important policies lying Title VII. In enacting Title VII, Cong pressed a strong preference for encouraging tary settlement of employment discrimination Indeed, "[c]ooperation and voluntary complian selected as the *preferred* means for achievi goal." *Alexander v. Gardner-Denver Co.*, 4 36, 44 (1974). Yet, if § 703(h) protection d extend to new agreements, collective bargaini ticipants and litigants will have less incentive tiate arrangements which, in many cases greatly ameliorate the disparate effects of p ployment practices, legal or otherwise.[15]

**B. There Is No Support In This Court's Deci In The Legislative History For Applying A Legal Standard To Post-Act Than To Pre-Ac ity Systems**

Aside from its predictable "chilling effect" negotiation and modification of seniority agre the circuit court's bifurcated approach to s

[15] The negative effect of the decision below on af action is fully set out in the petitioners' brief.

under § 703(h) would lead to non-uni
trative and judicial application of that
as the Fourth Circuit interprets § 703
bona fide seniority system, neutral on
as applied, would be lawful *in spite of*
tion of prior discrimination if it were
before July 2, 1965, but it would be
*because of* such perpetuation if impleme
effective date of the Act. Indeed, if th
cuit's view were correct, the neutral
tems in *Franks*, *Teamsters*, *Evans* a
*Brewers* would have been unlawful h
adopted after 1965 if they perpetuat
of pre-Act discrimination. Also, the s
could have similar pre- and post-Ac
the same plant for different bargainin
would be judged under different legal st
inconsistent result would hinge upon th
plementation of the system and not upo
teristics of the neutral system itself. N
this anomaly be unprecedented labor poli
show it would render ineffective this
decisions and nullify the intent of the
enacted Title VII.

Although this Court has analyzed th
of § 703(h) in cases involving seniority
petuation of both pre-Act and post-Ac
tion,[16] the Court never has suggested,
Circuit would have it, that post-Act syst

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[16] *Franks v. Bowman Transportation Co.*,
747; *International Brotherhood of Teamsters*
431 U.S. 324; and *United Air Lines v. Evan*
*Trans World Airlines, Inc. v. Hardison*, 432

judged under the *Griggs* disparate i
that the Court's holding depended up
implementation of the seniority syste

Rather, from *Franks*, *Teamsters*, *Ev*
*son*, it is evident that the Court vie
mandate as requiring that analysis of
of a seniority system proceed differen
ditional "disparate impact" cases. Fo
*Teamsters*, "[w]ere it not for § 703(h
system in this case would seem to
*Griggs* rationale." [17] While the *Grig*
impact) approach would require that
practice fair in form but discriminato
must be justified by business necessity
VII liability [*Griggs v. Duke Power*
U.S. at 429-32], "§ 703(h) unequivoc
that there is no statutory violation in
a showing of discriminatory purpose."
*Airlines, Inc. v. Hardison*, 432 U.S.
"[A]bsent a discriminatory purpose, t
a seniority system cannot be an unl
ment practice even if the system has
natory consequences." *Id.* at 82.

Moreover, the remedial purposes of
be served fully without changing or
bona fide, neutral seniority systems.
emphasized in *Teamsters*, "Post-Act
. . . may obtain full 'make whole' re
retroactive seniority under *Franks v.*

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[17] *Teamsters*, 431 U.S. at 349.

without attacking the legality
tem as applied to them." 431
that the relief available to dis
be enlarged by holding unlawf
that perpetuated the effects of
Act discrimination is, as the C
ply an additional reason not
system unlawful." *Teamsters*,
For the numerous reasons stat
basis for the Fourth Circuit's h
reads out of § 703(h) the inte
language and substitutes the *G*

Because the language of the
unqualified in defining the prot
all seniority systems, it is unne
legislative history which, as thi
unusual in light of the "absenc
tive materials" surrounding its
*v. Bowman*, 424 U.S. at 761.
the history, however, that woul
tion of § 703(h) to post-Act s
noted in this Court's discussio
*Franks*, the main thrust of the
was to assure critics of the leg
not disrupt the various types of
tems, or the rights of employe
systems, which had accrued pri
Title VII.

Specifically, the legislative re
Department statement and a se
questions and answers to the
would not affect bona fide neu

and would not require an emp
ing seniority lists even thoug
of such systems on minority
recognized by Congress. *Fran*
& nn.15 and 16. As set forth
brief, the legislative history d
statements designed to protect
tems were not in any way inte
limitations that somehow imply
were to be judged by a differe

To the contrary, because the
were designed to satisfy objec
Title VII that bona fide senio
attacked if the proposed legi
there is neither logic nor comm
Circuit's reading of such stat
Congressional intent to invalid
systems. It is unthinkable t
Title VII would have supported
hibit upon enactment precisely
seniority systems they so assi
tect. Rather, the contrary Co
been recognized by this Court:

> Title VII could not have
> without substantial suppo
> both Houses who traditio
> regulation of private busi
> demanded as a price for th
> agement prerogatives, an
> be left undisturbed to the
> ble." *United Steelworkers*
> 206.

Thus, the history of § 703(h)
reach of the statute as it per

fide seniority systems. 
dencing an intent to i
post-Act systems, or to 
prerogatives in the mann
Circuit.[18]

In sum, consigning p
the *Griggs* analysis wou
tems, revive the discredi
that discriminatory inte
Title VII violation found
perpetuation of the effe
Because there is no exp
tent to apply widely disp
Act and pre-Act seniori
son to interpret § 703(h
the section to "self-destru
inharmonious with Title
parent from the inconsi
that would flow from ap
cuit's holding, that Co
§ 703(h) should apply o

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[18] The Circuit Court's opi
construed to invalidate an e
ponent of that system were
of the Act. Take, for examp
system was modified on July
component of the type appr
*Brewers*. If the remaining h
system were then to be judge
of the post-Act modification,
existing systems would be r
as the *Brewers* decision m
§ 703(h) would still permit
*Griggs* standard to "practice
"swallowing up" Title VII's
U.S. at 608-09.

Congress intended
Title VII liability the o
systems, even when tho
the effects of prior disc
VII's remedial provisio
not bar, an award of r
timely-charged post-Ac
such discrimination ma
out judicial invalidatio
seniority systems whic
perpetuated the discri
context, it is clear that
to limit § 703(h)'s ap
not only is unsupported
Court's holdings, it woul
of the national labor po
whole. This Court shoul
Circuit's reading of § 7
any seniority system,
tected by that section u
intent to discriminate e
tiation or maintenance.